

Supervisory/Management Training on EPA's Anti-Harassment Policy EPA Order 4711-Procedure for Addressing Allegations of Workplace Harassment

Employment Law Practice Group

General Law Office

Office of General Counsel

Labor & Employee Relations Division

Office of Human Resources

Office of Administration and Resources
Management

The information provided herein is intended as general guidance. For specific legal or employee relations advice, please contact ELPG or LERD.

Paul

(Presentation team introduces themselves)

Session Objectives:

- ▶ Learn the basics of EPA's Procedure for Addressing Allegations of Workplace Harassment (EPA Order 4711)
- ▶ Discuss harassment claims
- ▶ Talk about best practices for responding to claims of harassment

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Paul

EPA's Anti-Harassment Policy & Procedure

- ▶ **Anti-Harassment Policy (January 6, 2016)**

- ▶ <http://intranet.epa.gov/civilrights/antiharrassment-policy.htm>

- ▶ **Procedure for Addressing Allegations of Workplace Harassment (EPA Order 4711)**

- ▶ <http://intranet.epa.gov/ohr/rmpolicy/ads/transorders.htm>

- ▶ Implemented in November 20, 2015

- ▶ Outlines the procedures for responding to claims of harassment

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Paul

Obligation to prevent harassment existed before 4711. 4711 merely formalizes the process.

Harassment was the major focus of July 2015 hearings in front of the House Oversight Committee and is a growing area of employment litigation.

Our goal here is to ensure that EPA is a positive, supportive work environment for all employees.

What is Harassment?

- ▶ Inappropriate, unwelcome conduct, verbal or physical
 - ▶ that adversely affects the work environment or terms and conditions of the affected person's employment, or
 - ▶ an employment decision impacting the affected person is based on his or her acceptance or rejection of such conduct

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Paul

Define quid pro quo as "this for that"

It is first important to understand what harassment is and how it often arises in workplace scenarios.

EPA Order 4711 is expansive in nature.

Harassment can be:

- ▶ based on an individual's race, color, sex, national origin, religion, age, disability, prior EEO activity, sexual orientation, status as a parent, marital status, political affiliation, protected genetic information
- ▶ or other types of conduct, such as threatening, intimidating, bullying or disturbing, that are not based on any protected class

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Paul

While most people think of "sexual harassment," harassment is not just limited to an individual's sex or gender. Harassment can be based on an individual's national origin, religion, race, disability, etc. Or, it can just be conduct that is bullying or threatening in nature.

Harassment can occur in different forms:

▶ Oral or Written Communication

- ▶ Name calling, jokes, or slurs
- ▶ Threats
- ▶ Offensive e-mails

▶ Non-verbal conduct

- ▶ Unwanted touching of a co-worker
- ▶ Display of pornography
- ▶ Sexually suggestive staring or leering

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Paul

What is sexual harassment?

- ▶ Sexual harassment is any unwanted sexual behavior.
 - The agency's prohibition goes beyond the strict legal definition of sexual harassment.
 - One instance can be enough to support discipline.
 - Quid pro quo is not required.
 - Hostile work environment is not required.

Verbal Examples

- Lewd jokes
- Demeaning comments
- Sexually suggestive comments
- Inappropriate comments about physical appearance
- “Locker room talk”

Non-Verbal Examples

- Sexually explicit screen savers
- Sexually explicit calendars and posters
- Sexually explicit pictures attached to e-mails and texts
- Sexually explicit Snapchats
- Showing co-workers sexually explicit pictures on one's phone
- Sexually suggestive gestures
- Watching porn

Physical Examples

- Touching
- Pinching
- Grabbing
- Cornering
- Blocking passageway
- Patting
- Bumping
- Unsolicited back or neck rubs
- Kissing

Building Trust

- ▶ People should be assured that:
 - Management will listen to them
 - Management will take their complaints seriously
 - If they have been sexually harassed, management will take corrective action
 - They will not suffer retaliation

The Office of Inspector General (OIG)

- ▶ Threats of violence, an actual assault, or any acts of violence must be reported immediately to agency security officials, local law enforcement, and the OIG
- ▶ Anyone can also contact the OIG Anonymous Tip line:
 - ▶ 1-888-546-8740

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Paul

Harassment can even rise to a criminal level and if you receive reports of threatened violence, an actual assault (like unwanted touching) or any acts of violence, you **MUST** immediately report it to the OIG.

Introductory Transition

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Role Identification

- Affected Person - the complainant
- Alleged Harasser - individual accused
- Supervisor/Manager - either the complainant's or the alleged harasser's supervisor
- Decision Maker - normally the alleged harasser's first line supervisor
- Agency HR Official - Human Resource Officer, Program Management Officers, Workplace Solutions Official or Labor and Employee Relations Specialist
- Legal Counsel - An attorney with the Office of General Counsel
- Fact-Finder - Individual designated to investigate allegations of harassment, bullying and/or intimidation

Who can be harassed?

- ▶ Order 4711 defines affected person as someone who believes he or she has been subjected to harassment in the course of his or her employment or performance of agency-related functions and is applicable to:
 - ▶ any federal EPA employee
 - ▶ an applicant for employment with EPA
 - ▶ a Senior Environment Employee enrollee (SEE)
 - ▶ a student volunteer or intern such as ORISE Participants

Who can be a harasser?

Anyone!

- ▶ A supervisor
- ▶ A co-worker or other EPA employee
- ▶ Even a non-employee
 - ▶ (i.e., a contractor, a grantee)
- ▶ Anyone visiting EPA facilities

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Randy

Who can report harassment?

- ▶ The Affected Person or their personal representative designated in writing
- ▶ A union representative
- ▶ A witness to an incident
- ▶ A supervisor
- ▶ A co-worker
- ▶ A contractor

Introductory Transition

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Receiving Harassment Complaints

- ▶ Per EPA Order 4711, harassment allegations are reported to:
 - ▶ Supervisors
 - ▶ Managers
 - ▶ Agency HR Officials

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LER

What should a supervisor do when harassment is reported?

- ▶ Carefully take notes of any oral discussions with the affected person
- ▶ Request that the affected person provide a written account of the harassment
- ▶ Immediately contact your servicing 4711 Program Management Official in Labor and Employee Relations (LER):
 - ▶ RTP - Gordon.Noreen@epa.gov or Cincinnati - Gates.Lonnie@epa.gov
 - ▶ HQ - Ferrell.Randolph@epa.gov or Johnson.Lindsey@epa.gov
- ▶ Be prepared to discuss the situation
- ▶ Consider whether any immediate action is needed

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Lindsey

LER has template to request written statement from employee ready for you!

Supervisor should be mindful as to who else is involved in receipt of the employee's statement. Be careful with copying various levels of management when asking for the statement or after receiving the statement.

Immediate Action

- ▶ Immediate action may include:
 - ▶ (1) Making work scheduling changes
 - ▶ (2) Temporarily reassigning the alleged harasser to another location.
 - ▶ The affected person should never be involuntarily reassigned as a result of an allegation
 - ▶ (3) The alleged harasser may be placed on administrative leave, if necessary with proper approval

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(3) When utilizing this option, managers should ensure the amount of time an employee is placed on non-disciplinary leave with pay is minimized to the extent possible and appropriate.

(4) Where the alleged harassment involves conduct that may be criminal in nature (e.g., assault or battery), the matter should be immediately referred to an appropriate law enforcement entity including FPS and to the OIG. In situations where a law enforcement agency or the OIG initiates an investigation, any fact-finding conducted under this order should only be conducted when coordinated with and authorized by the law enforcement agency or the OIG. In cases involving the OIG, the decision-maker, in consultation with agency legal counsel and an agency HR official, should coordinate with the OIG on other steps that may be taken to prevent further harassment to the affected person pending an OIG review or investigation into the allegations.

What happens after an individual reports harassment?

- ▶ The manager, HR official, and legal counsel will identify the decision maker.
- ▶ The decision maker, HR official, and legal counsel will determine next steps which may include appointing a fact-finder to conduct fact-finding.
 - ▶ A fact-finding may include:
 - ▶ interviews with the affected person(s), the alleged harasser(s) and witnesses
 - ▶ written statements, emails, or photographs

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Lindsey

Not all cases warrant a fact-finding. Some do not elevate to harassment, and should be dismissed without fact-finding.

Also – please do not automatically accept a report of harassment as a full fact-finding under EPA Order 4711. Please ensure that you're consulting with LER and OGC prior to making a determination to accept OR deny an allegation.

What is the Decision Maker's role?

- ▶ Communicate the initiation and conclusion of the fact-finding process
- ▶ Review the fact-finding report and gathered evidence
- ▶ Consult with the designated HR official and legal counsel
- ▶ Determine whether the results demonstrate that any harassment occurred
- ▶ Take appropriate corrective action, if warranted

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LER

In some circumstances, it may be difficult for a decision-maker to reach a determination because of contradictory information and a lack of documentary or eyewitness corroboration. In such cases, the decision-maker should perform a credibility assessment – instructions found in Appendix B of EPA Order 4711

Examples of corrective action:

- a. Restoration of leave taken because of the harassment if it is determined that leave was taken as a direct result of harassment;
- b. Offer of reinstatement to a former employee when it is determined that he or she left EPA involuntarily primarily due to harassment;
- c. Expunging negative evaluation(s) in employee's personnel file that arose from the harassment if it is determined that the negative evaluation directly resulted from harassment;
- d. Training;
- e. Reassignment of the alleged harasser, and/or,
- f. Disciplinary action.

Relationship Between 4711 and the Disciplinary Process

- ▶ If the decision-maker finds that an allegation of harassment is supported, that can become the basis for discipline
- ▶ Results of a 4711 investigation can be used as evidence if the harasser is disciplined and appeals to the MSPB or files an EEO claim

Relationship of 4711 to the EEO and Grievance Processes

- ▶ 4711 provides an administrative process independent of the EEO and grievance processes
- ▶ Affected persons may report harassment under 4711 and use the EEO process, or the grievance process, at the same time
- ▶ Results of a 4711 investigation can be used as evidence in an EEO case
- ▶ Failure to promptly conduct a 4711 investigation can be used as evidence against the agency in an EEO case

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Paul

Separate from EEO and grievance process-4711 process merely formalizes already existing management obligation

Retaliation is Prohibited

Retaliation against any person who:

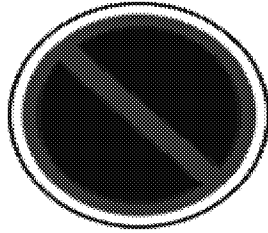
- ▶ reports harassment; or
- ▶ participates in a fact-finding

is prohibited, and may result in disciplinary action, including dismissal

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Lindsey

**Harassment is not
tolerated at EPA.**



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Lindsey

Supervisors need to recognize claims of harassment and address them expeditiously.

Introductory Transition

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Legal Exposure for Harassment claims can be significant:

- ▶ The Equal Employment Opportunity Commission (EEOC) found that
 - ▶ Agency management failed to respond to the employee's claims of harassment based on sex and race (including physical assault) and
 - ▶ discriminated against the employee
 - ▶ Akiko L., Complainant v. U.S. Postal Service,
EEOC Appeal No. 0720120027, 114 LRP 18068
(April 2, 2014)
 - ▶ Employee Awarded: \$210,000.00.

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Supervisors have been disciplined for not taking action or committing harassment at EPA

Legal Exposure for Harassment claims can be significant:

► The EEOC found that the employee was subjected to 2 years of constant race-based harassment, aggressive and threatening behavior (including being called insulting names.)

► Terban v. Dep't of Energy,

EEOC Appeal No. 0720040117, 108 LRP 20919

(April 3, 2008)

► Employee Awarded: \$136,000.00

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Might not be EEOC—could end up in jury trial in DC District Court. Could persuade a jury to award a significant amount of award

Best Path Forward:

- ▶ Review EPA Order 4711
- ▶ Take the 30-minute Skillport Training:
 - ▶ “Anti-Harassment Procedures Training for EPA Employees”
- ▶ Work closely with your assigned LER Specialist
- ▶ Respond quickly to reports of harassment
- ▶ Foster a positive work environment for all employees

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Highlight bullet #2:

The Skillport Training is focused and detailed: 30-minutes.

Order 4711 is complicated process and LER specialist is expert to work with

The LER Specialist should be the first point of contact if a supervisor has questions. If you do not know who your assigned LER Specialist is, find out immediately. That person should be a strong resource for you.

How would you respond ?

►Scenario One:

►You are in the kitchen heating up your lunch when two employees, Mo and Larry, walk in and strike up a conversation with you. They are talking about Bebe, an employee you supervise. Mo mentions how frustrating it can be to work with Bebe, and Larry agrees. Larry says that although he is accustomed to Bebe's working style, others find her more abrasive. Specifically, Larry mentions that fellow employee Curly is "bullied" by Bebe. Mo chimes in and agrees, saying that he feels bad that Bebe "bullies" Curly. You gather your lunch and exit the conversation, concerned about what you have just been told. 32

What do you do next? (Contact LER)

Raises issue of "secondhand" harassment allegation—who reports it?

Do you take any immediate action in regards to separating Bebe and Curly?

Raises issue of who the decision maker is—you supervise Bebe, but can you be the decision maker since you were involved in the conversation with Mo and Larry?

Management obligated to report harassment if they are aware of it—regardless of whether employee wants to file a 4711 complaint. Management obligation to look into allegations of harassment

How would you respond ?

► Scenario Two:

- One of your employees, Alex, asks to speak with you privately. Alex tells you that she is concerned about Jerry, her coworker and another employee you supervise. Recently, Jerry has been bothered by interactions with an employee from another office named Tom, who sits in the same hallway as Jerry. Their interactions started off normally—they exchanged pleasantries in the hallway and occasionally went to lunch together during working hours. Lately, Tom has been pressing Jerry to get together for coffee, but Jerry has politely declined. Tom sent Jerry an email calling him “ungrateful” and keeps dropping by Jerry’s office to try to speak with him, which Jerry finds “creepy.” Alex has noticed that Jerry has been taking sick days recently to avoid interacting with Tom. You do not supervise Tom.

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What do you do next? (Contact LER)

Raises issue of what to do when the alleged harasser is an employee you do not supervise (or even work in the same office with)

Do you take any immediate action in regards to separating Tom and Jerry?

How would you respond ?

► Scenario Three:

- Taylor, an employee you supervise, sends you an email stating that she is being harassed by her coworker, Calvin. She states that Calvin has been “mean” to her, “stares her down” in the hallways, and has subjected her to a “hostile working environment.” She states that she is “afraid” of Calvin and requests to file a 4711 complaint against him. She also requests to telework full time until the situation with Calvin can be addressed.

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What do you do next? (Contact LER)

Raises issue of “threshold” 4711 complaint—is what the employee has stated enough to initiate a fact-finding? If everything Taylor stated were true, would it violate the 4711 order?

Note that even if employees use “buzz words” in a complaint (hostile work environment, afraid) that does not necessarily mean the complaint is sufficient.

Do you take any immediate action in regards to separating Taylor and Calvin?

How would you respond ?

- ▶ Scenario Four:

- ▶ An employee requests anonymity in reporting an incident of harassment

QUESTIONS?



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